COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

R. C. ATKINS AND COMPANY, *Respondent*

BRIEF OF RESPONDENT, R. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

1. The Decision in the *Atkins Case,* holding that Militarized Guards are not "employees," does not Conflict with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Case* 1

(a) The Employer Admitted Plant Guards were "employees" in the *Jones Case* 7

(i) Transcript of Record—Case No. 1237 7

(ii) Brief for Jones & Laughlin Steel Corporation in the Sixth Circuit Court of Appeals 9

(iii) Brief of Chrysler Corporation as *Amicus Curiae* 10

(b) The Employer Admitted Plant Guards were "employees" in the *Federal Case* 10

(i) Transcript of Record—Case No. 1236 10

(ii) Brief for Federal Motor Truck Company 12

(iii) Brief of Chrysler Corporation as *Amicus Curiae* 13

(c) The Employer-Respondent Contested the Board's Claim that Plant Guards were "Employees" in the *Atkins Case,* and the Uncontroverted Evidence Established such Plant Guards were not Employees 13

(i) Transcript of Record—Case No. 1238 13

(ii) Brief of Employer-Respondent Filed in the Seventh Circuit Court of Appeals 16

Page

(d) The Decision in the *Atkins Case* Does Not Contravene the Decision of the Supreme Court in the *Hearst Case* 18

2. The Decision in the *Atkins Case* Holding that it will not Effectuate the Policies of the Act to require the Employer to bargain with Militarized Guards is in complete accord with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Steel Corporation Case* 20

3. The Decision in the *Atkins Case* Does not "Overturn" the Board Policy which, for a period of nearly Three (3) Years has effected Stable Conditions in a Large and Difficult Area in Labor Relations..... 22

4. Demilitarization of the Plant Guards at the Atkins Plant Constitutes the Further Prosecution of the *Atkins Case* a Moot Case..... 22

5. The Petition for Certiorari should be Dismissed for Improper Joinder 23

6. The Respondent Requests Leave to Reserve Certain Points not presented by the Petition for Certiorari, if the latter is granted..... 24

7. Conclusion 25

TABLE OF CASES

Pages

E. C. Atkins and Company Case.....1, 6, 7, 13, 18, 19, 20, 21, 22, 23, 24, 25

Chrysler Corporation, Matter of, 44 N.L.R.B. 881.....17, 24

Dravo Corporation, Matter of, 52 N.R.L.B. 322.....5, 6, 17,24

Federal Motor Truck Company, Matter of, 50 N.L.R.B. 213.....1, 2, 6, 7, 10, 20, 21, 22, 23

Hearst Publications, Inc., Matter of, 332 U. S. 111....18, 19, 20

Jones & Laughlin Steel Corporation, Matter of 49 N.L.R.B. 390 .....1, 2, 6, 7, 20, 21, 22, 23

(First) Maryland Drydock Company Case, 49 N.L.R.B. 733.....2, 4, 5

(Second) Maryland Drydock Company Case, 50 N.L.R.B. 363.....5, 6

McQuay-Norris Manufacturing Co. v. N.L.R.B., 119 F. (2d) 1009..... 25

N.L.R.B. v. Express Publishing Co., 213 U. S. 426..... 25

N.L.R.B. v. Skinner & Kennedy S. Co., 113 F. (2) 667, (C. C. A. 8)..... 6

Phelps-Dodge Copper Products Corp., Matter of.....17, 24

IN THE

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OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. E. C. ATKINS AND COMPANY, *Respondent.*	No. 1238

BRIEF OF RESPONDENT, E. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, E. C. ATKINS AND COMPANY, respectfully prays that the Petition of the National Labor Relations Board for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 27, 1945 (*Atkins*, R. 267) be denied.

Answering each of the "Reasons for Granting the Writs," set forth at pages 16 to 29, both inclusive, of the Petition for Writ of Certiorari, the Respondent makes the following contentions:

1. **The Decision in the *Atkins Case*, holding that Militarized Guards are not "employees," does not Conflict with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Case*.**[1]

[1] Following the precedent set by the Board in its Brief, record references relating to the records in Cases Nos. 1236, 1237 and 1238 will appear as follows: Federal Motor Truck Company (*Federal*, R. ------); Jones & Laughlin Steel Corporation (*Jones*, R. ------); and E. C. Atkins and Company (*Atkins*, R. ------).

In the *Federal Case* and the *Jones Case,* as well as in the one hundred thirty-five cases cited in Appendix C of the Board's Petition for Certiorari (pages 38-41), the employers conceded that the militarized plant protection employees were "employees"; that they were representatives of management; that they had interests akin to the corporation, rather than to the production employees; and that they were more in the status of supervisors than in the status of fellow production workers. The employers in all such cases, however, sought to bring the militarized plant protection employees concerned within the rule established by the National Labor Relations Board in the first *Maryland Drydock Company Case,* 49 N. L. R. B. 733. In that case, the Board debated as to whether supervisory employees were "employees" within the meaning of Section 2(3), or "employers," within the meaning of Section 2(2), of the National Labor Relations Act. The discussion of the Board upon this point is here set forth in full:

> "So far as the reported decisions of the Board indicate, it was not until 1942, when the Act was in its seventh year, that the Board was called upon to decide whether or not a unit composed entirely of supervisory employees was a unit appropriate for the purposes of collective bargaining as described in Section 9(b). The necessity for deciding this question arose because of the duty imposed upon the Board by Section 9(c), providing in part, 'Whenever a question affecting commerce arises concerning the representation of *employees,* the Board may investigate such controversy and certify . . .' (Emphasis supplied.) In the judgment of the majority of the Board the answer to that question turned upon whether or not supervisors were necessarily to be deemed employees for the purposes of the Act. In determining this question, the majority of the Board

relied primarily upon the statutory definition of 'employee' in Section 2(3), the relevant language of which reads as follows: 'The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.' Because of the broadness of this language and the fact that supervisors were not included among the three enumerated exceptions the inference was drawn that Congress must therefore have intended to cover persons employed in supervisory capacity. There is nothing, however, in the committee reports or in the debates in the House and Senate which would indicate that this specific problem was ever considered by the Congress. Moreover, although there are decisions of the Circuit Courts of Appeals holding that the Board did not err in finding that the discharge of foremen under particular circumstances was a violation of Section 8(3), we have found no Court decisions which hold that units of foremen must be recognized by the Board as being appropriate for collective bargaining. Consequently, the question is still an open one.

While it may be conceded that the question is close, we are no longer convinced that from the mere determination that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units. Such a theory seems logically to impel the conclusion that all employees not specifically omitted from this subsection fall also within Section 9(b). The Board would then have to hold in each case that the highest corporate officials, including even presidents and general managers, were entitled to be included in appropriate collective bargaining units, since everyone associated with a corporation, except the stockholders and the board of directors, is an employee. Such a construction of the Act ignores the fact that it was passed against

the background of an industrial society in which the vast majority of business enterprises are conducted in the corporate form. While the maxim *inclusio unius est exclusio alterius* is a well-established canon of statutory construction, the courts have recognized its limitation, where its application leads to results so absurd as to make it unreasonable to believe that they were intended by Congress.

Thus the failure of Congress to expressly include 'subordinate officials' within the definition of employees in Section 2(3), particularly when viewed in conjunction with the broad definition of 'employer' in Section 2(2) of the Act, indicates that determination of this type of question is a function reserved to the administrative discretion of the Board. This conclusion is supported moreover by the provisions of Section 9(b) which render it incumbent upon the Board to consider whether the unit alleged to be appropriate in each case will insure to employees the full benefit of their right to self-organization and to collective bargaining and *otherwise effectuate the policies of the Act* (emphasis supplied). In making this determination it is relevant for us to inquire into the status in the managerial hierarchy of the personnel claiming to be an appropriate unit. It is likewise relevant for us to inquire as to the effect that their inclusion will have upon the exercise of the rights of self-organization and collective action of the production employees, and it is further relevant for us to inquire whether our determination in any particular case that supervisory employees constitute a unit appropriate for collective bargaining will so compromise the status of such employees as to result in disruption of the practice of collective bargaining rather than industrial peace." (First *Maryland Drydock Company Case*, 49 N. L. R. B. 733, 737-739.)

It will be seen that the foregoing discussion in no manner doubts that supervisory employees, not to say corporate officers, are "employees," within the common law meaning of the latter word. The decision merely goes off upon the point as to whether it will best effectuate the policies of the Act to establish appropriate bargaining units composed of supervisory employees.

The first *Maryland Drydock Company Case*, 49 N. L. R. B. 733, was decided by a majority of the National Labor Relations Board on May 11, 1943. Depending upon that decision, most of the employers represented in the one hundred thirty-five cases cited by the Board sought to establish that militarized plant guards were supervisory employees acting in the interest of the employer, and consequently not subject to organization in an appropriate bargaining unit under the provisions of the National Labor Relations Act.

The decision of the Board in the first *Maryland Drydock Company Case*, 49 N. L. R. B. 733, was held inapplicable to plant guards because plant guards did not have "the power to hire or discharge other employees, or recommend such action, or otherwise represent management in the area of labor relations and policy."

Second *Maryland Drydock Company Case*, 50 N. L. R. B. 363, 369.
Dravo Corporation Case, 52 N. L. R. B. 322, 327.

In these cases, as in the one hundred thirty-five cases cited by the Board (Petition for Certiorari, pages 37-41) the employers did not contend that the militarized plant protection employees were not employees of the employer, but merely that it would not effectuate the policies of the

Act to constitute them units appropriate for collective bargaining.

The *Atkins Case* is the first case in which an employer contended that militarized plant guards were not "employees" in any common law or statutory sense, irrespective of the policies of the Act.

In the *Atkins Case,* the employer contended that the plant guards, stationed at its two plants, were completely within the control of the military police, and not subject in any respect whatever to the instructions or control of the Board of Directors and officers of the Respondent.

The Circuit Court of Appeals for the Sixth Circuit, therefore, in the *Federal Case* and the *Jones Case,* merely confirmed the ruling of the National Labor Relations Board in the second *Maryland Drydock Company Case, supra,* and the *Dravo Corporation Case, supra,* when it said:

> "In determining an appropriate unit for collective bargaining, the Board is required by Sec. 9(b) to consider whether its order will insure employees the full benefit of their rights to self-organization and collective bargaining, and this involves the inquiry as to who are 'employees,' or to be more specific, whether 'plant protection employees' are entitled to the benefits of the Act. Here, the Board must give consideration to Sec. 2(2) and (3). Subdivision (3) provides that 'the term "employee" shall include any employee * * *,' but subdivision (2) provides that the 'term "employer" includes any person acting in the interest of an employer directly or indirectly * * *.'
>
> Plant protection employees are 'employees' when considered in their relationships to their employer (N. L. R. B. v. Skinner & Kennedy S. Co., 113 Fed.

(2d) 667, 671 (C. C. A. 8)) but we find it difficult to determine that they are 'employers' when their relationship to their fellow employees is considered. However, under the facts pertaining to their duties as hereinafter set forth, we are unable to say that the Board exceeded the limits of its discretion in determining that plant protection employees are entitled to the protection of the Act." (*Federal*, R. 113).

An examination of the record and briefs in the *Federal Case* and the *Jones Case*, if compared with the record and briefs in the *Atkins Case*, will readily illustrate the difference in the contentions of the employers in the three cases.

(a) The Employer Admitted Plant Guards were "employees" in the *Jones Case*.

An examination of the record and briefs in the *Jones Case* discloses that the employer contended its plant guards were its "employees."

(i) Transcript of Record—Case No. 1237.

Page 8—Statement by Mr. Blank, plant manager, that the *watchmen* "have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the Union to have these people serve management's interest without other affiliation."

Page 77—Letter from Mr. Blank to the Union —"it is our intention to use every legal means available to us to have plant guards classified with Super-

visors in respect to collective bargaining."

Page 78—Bulletin Board Notice—

"Jones & Laughlin Steel Corporation has consistently maintained that supervisors and plant guards *should not* be included in bargaining units because both groups represent management in safeguarding the Corporation's property and maintaining order and discipline among its employees.

"Because our plant guards, like our supervisors, have been regarded as members of the management's staff, they have been expressly excluded from all our union agreements. Plant guards, as an arm of management, have always been maintained as an effective, responsible, and efficient organization. The responsibilities of plant guards to management are essentially the same as peace officers' duties to the Governor of a State or the Mayor of a City. Management could no more operate efficiently without plant guards responsible solely to it than public officials could operate without their sworn peace officers."

Page 94—Respondent's Exceptions to Intermediate Report—

"Inasmuch as a corporation can act only through individuals, all of whom are employes of the corpora-

tion, such employes acting in that capacity are deemed to be within Section 2(2) of the Act. The plant guards at the Otis Works of the Corporation represent management by enforcing the rules and regulations of the Corporation, protecting corporate property, and making confidential investigations for the Corporation and various governmental agencies. Hence, any construction of the Act that would make a finding that plant guards are employees within the meaning of Section 2(3) of the Act, would in effect deprive management of a class of those employees who can and do properly act *in the interest of the employer.*"

(ii) **Brief for Jones & Laughlin Steel Corporation in the Sixth Circuit Court of Appeals.**

Page 9—Statement of Board's position and employer's position. The employer concedes "that plant guards are 'employees' within the meaning of the Act, for many purposes."

Pages 28—

29—"It has never been contended that the managerial force of any industrial enterprise is entitled either to vote in Board elections, or to be represented by unions—least of all by the same unions which represent productive labor."

(iii) **Brief of Chrysler Corporation as *Amicus Curiae.***

Page ii—The Question Involved—

> "May the National Labor Relations Board apply other tests for determining whether plant protection patrolmen are 'employers' or are 'employees' with whom the Respondent must bargain under the National Labor Relations Act, instead of applying the one test that Congress expressly prescribed, namely, whether or not they act in the interest of the employer in dealing with employees?"

(b) **The Employer Admitted Plant Guards were "employees" in the *Federal Case.***

An examination of the record and briefs in the *Federal Case* discloses that the employer contended its plant guards were its "employees."

(i) **Transcript of Record—Case No. 1236.**

Page 25—Decision and Direction of Election—

> "The Company argues that in normal times the duties of the plant-protection employees are such that these employees are part of the managerial and supervisory arm of the Company. • • • The Company asserts that in times of industrial strife these employees must necessarily be aligned with management because of their duties."

Page 35—Statement of Mr. Meder—

"The position of the Federal Motor Truck Company is, *in the first place,* that the Plant Protection men are a part of the supervision, part of management."

Page 53—Testimony of Mr. Lutton—

"Q. In other words, you do the employment subject to the discretion of the army to discharge them, if they so see fit?

A. That is correct.

Q. Has the army exercised its discretion with respect to any of your 18 Plant Protection employees?

A. No, it hasn't.

Q. You have control over your Plant Protection employees insofar as regulating their hours of work, is that correct?

A. Correct.

Q. Their wages?

A. Correct.

Q. Assignment to shifts or posts?

A. That is correct.

Q. And you have the right to discharge them or discipline them, is that correct?

A. That is correct."

(ii) **Brief for Federal Motor Truck Company.**

Page 0—Statement of Questions Involved—

"1. Are the members of respondent's Militarized Plant Protection Force 'employees' of respondent as 'employees' are defined in the National Labor Relations Act? *The respondent asserts that they are its employees,* but are not entitled to the benefits and sanctions of the Act in respect to collective bargaining."

Page 2—The answer of the respondent is analyzed, emphasizing that the plant protection "employees" are part of supervision.

Page 12—Argument of Law—

"Supervisory employees are not entitled to the benefits and sanctions of Section 9 of the National Labor Relations Act, and are not appropriate units for collective bargaining under that Act."

Page 17—The plant guards "are, in effect, the eyes of the employer. Through these plant guards the employer sees the plant conditions and the conduct of the workmen. They are also one of the hands or agencies through which management deals with the plant and workmen conditions."

Page 18—Effect of Militarization—

> "We have made no point that the fact of militarization alone changed the status of these men from rank and file workmen to supervision. Militarization alone did not accomplish that. * * * Duties and responsibilities were added and they were new duties to the employer and new responsibilities as to the observance and correction of the conduct and work of the rank and file workmen."

(iii) **Brief of Chrysler Corporation as *Amicus Curiae.***

Page ii—The Question Involved—

> "May the National Labor Relations Board apply other tests for determining whether plant protection patrolmen are 'employers' or are 'employees' with whom the Respondent must bargain under the National Labor Relations Act, instead of applying the one test that Congress expressly prescribed, namely, whether or not they act in the interest of the employer in dealing with employees?"

(c) **The Employer-Respondent Contested the Board's Claim that Plant Guards were "Employees" in the *Atkins Case*, and the Uncontroverted Evidence Established such Plant Guards were not Employees.**

(i) **Transcript of Record—Case No. 1238.**

Page 107—PANTZER: So that your obligations to carry out specific tasks are

directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the Military regime that you are working with?

GANN: That's right.

Page 111—PANTZER: The Captain we referred to there is Capt. Wetenhall who signs all major orders down in Cincinnati?

GANN: That is right.

Page 106—PANTZER: Well, these special orders then relate to your military duties?

GANN: That's right.

PANTZER: By whom are they issued?

GANN: They are issued by the company commander.

PANTZER: Who is the company commander?

GANN: Mr. Wetenhall, of course, of the Government. I mean now the Government issues the general orders, but I mean we get all of the dope, procedure, from Mr. Wetenhall pertaining to the Auxiliary Military Police. The general orders originate from the Company.

Pages 106—107 PANTZER: And when you said "company orders" you did not mean the E. C. Atkins Company, but the

military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall.

GANN: Well, that's true.

PANTZER: Special orders come from that company?

GANN: What I meant was they are different from the general orders in this way, that they apply to a particular post while the general orders are for the whole guard in general.

PANTZER: So that your obligations to carry out specific tasks are directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the military regime that you are working with?

GANN: That's right.

Page 125—RICHARDSON: Suppose Mr. Atkins came out and gave you an order. Would you obey that?

JOHNSTON: I never got an order.

RICHARDSON: If you did, would you obey that order?

JOHNSTON: Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place.

Page 123—PANTZER: Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

JOHNSTON: No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

PANTZER: Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

JOHNSTON: They would—that would be their orders—to follow mine, yes, sir.

(ii) **Brief of Employer-Respondent Filed in the Seventh Circuit Court of Appeals.**

The plant guards of the Respondent, E. C. Atkins and Company, in the instant case, perform the following **functions**: They guard the plant (Gann, 1R.A.6); obey the three general guard orders and specific orders which the Military Police Company asks the plant guards to obey (Gann, 1R.A. 6; Johnston, 1R.A. 21, 26, 27); watch for suspicious circumstances around the plant (Gann, 1B.A. 42); look for fires (Gann, 1B.A. 42); observe production workers (Gann, 1R.A. 6-7); report misfeasances of production workers (Gann, 1R.A. 7); report sabotage (Gann, 1R.A. 7); report violation of orders (Gann, 1R.A. 12; Johnston, 1R.A. 23); direct trucks entering the plant (Gann, 1R.A. 14); supervise employees entering the plant (Johnston, 1R.A. 24); supervise passage of employees within the

plant (Johnston, 1R.A. 25); and suspend production employees for drunkenness (Johnston, 1R.A. 32).

The evidence as to the performance of such foregoing **functions** by the plant guards stationed at the Respondent's two plants was undisputed. To argue, however, that similarity or even identity of **functions** between the plant guards in the *Phelps-Dodge, Chrysler* and *Dravo Cases,* and the plant guards in the instant case proves the plant guards in the instant case are "employees" of the Respondent, is to perpetrate a logical fallacy. It would be just as illogical to argue that inasmuch as the man who performs the function of driving a motor vehicle for a certain corporation is its "employee," that therefore all persons who drive motor vehicles are "employees."

As a matter of fact the evidence of **function** takes up less than five per cent of the total verbal testimony adduced at the hearing in the Representation Case. The real issue raised by the pleadings, briefs, and oral argument was whom the plant guards were **representing** in performing these **functions.** All the testimony of the witnesses for the Respondent was directed toward establishing that the **functions** of the Respondent's plant guards were performed as "representatives" of the military authorities and not as "representatives" of the Respondent, and as will appear from the Record, Gann and Richardson, the two witnesses for the Board, agreed completely with the testimony of Johnston and Wood, the two witnesses of the Respondent, on this point. (Brief for Respondent in 7th C.C.A. p. 20-22.)

An analysis of the Records and the Decisions in the three cases, therefore, completely refutes the first basis for certiorari advanced by the Board.

(d) **The Decision in the *Atkins Case* Does Not Contravene the Decision of the Supreme Court in the *Hearst Case*.**

The Board says at page 19 of its Petition for Certiorari:

> "The evidence shows that the guards' duties, functions, obligations, and relationship with the management were not different in the *Atkins* case from those existing in the 'typical' plant guard cases (*supra*, p. 17). The Seventh Circuit apparently was of the view that the fact that the chief guard, a company employee who exercised control over the other guards in the performance of their day to day duties (*supra*, p. 11), regularly received orders from the military authorities rather than from Company management (*Atkins*, R. 47, 117-120, 123) offset the other considerations weighed by the Board. But as this Court held in the *Hearst* case, *supra*, 322 U. S. at 128, 'control of "physical conduct in the performance of the service" • • • the traditional test of the "employee relationship" at common law,' is not the predominant test under the Act."

In making the preceding pronouncement, the Board does violence to the opinion of Mr. Justice Rutledge and the ruling in the *Hearst Case*.

It will be recalled that Mr. Justice Rutledge felt "the record sustains the Board's findings and there is ample basis in the law for its conclusion." (322 U. S. 132.)

It will be necessary to examine the actual decision of the National Labor Relations Board in the *Hearst Case* in order to see how much the opinion of Mr. Justice Rutledge confirmed the finding of the Board that *control and direction*

were the principal criteria in establishing the employee-employer relations in the *Hearst Case*. After indulging in a twelve page analysis of the "Status of the Newsboys Involved in this Proceeding," in which all facts respecting the status of the Newsboys were considered, the Board made the two following pronouncements:

> "On the basis of the foregoing, we are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act." (28 NLRB 1022-3).
>
> "We • • • hold upon this record that the newsboys herein involved are within the definition of employees as the term is used in this Act. Accordingly, we find that the newsboys involved in this proceeding are employees within the meaning of Section 2(3) of the Act." (28 NLRB 1024).

The Respondent further calls attention to the following quotation at page 18 of the Board's Petition for Certiorari:

> "Plainly when the War Department, which created the Auxiliary Military Police, provided expressly that the guards' compensation was to be determined between the guards and the management, that the guards were to remain subject to the usual social security, workmen's compensation and employer's liability provisions applicable to employees, and that they were to be 'permitted to bargain collectively,' it manifested its understanding that they continued to be employees for purposes of labor relations and other labor legislation."

Again the Board has failed to note the dissimilarity between the facts in the *Atkins Case* and those in the

Hearst Case. Mr. Justice Rutledge points out in the latter case that:

> "there is either no evidence in the record to show, or the record explicitly negatives, that respondents carry the newsboys on their payrolls, pay 'salaries' to them, keep records of their sales or locations, or register them as 'employees' with the Social Security Board or that the newsboys are covered by workmen's compensation insurance or the California Compensation Act." (322 U. S. 119, Footnote 17.)

The *Hearst Case* stands for one thing, and one thing alone—namely, that the Board must look at the actual facts of control and supervision, rather than fictions, in determining whether plant guards are, or are not, employees of the corporation where they are stationed.

2. **The Decision in the *Atkins Case* Holding that It Will Not Effectuate the Policies of the Act to Require the Employer to Bargain with Militarized Guards is in Complete Accord with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Steel Corporation Case.***

The Seventh CCA decided the *Atkins Case* upon two grounds, the second of which was that it would not effectuate the policies of the National Labor Relations Act to require the Atkins Company to bargain with the plant guards stationed at its plants. This was a separate and independent ground of decision, the Court saying:

> "The further question, closely related to the one we have just decided, is whether the Board's order requiring respondent to bargain with the Union should be enforced. In considering this question,

we assume, contrary to our holding, that members of the military guard are employees of respondent." (*Atkins* R. 265).

The Seventh CCA then goes on to say:

> "In the recent cases of N. L. R. B. v. Jones and Laughlin Steel Corp. and N. L. R. B. v. Federal Motor Truck Co., decided December 8, 1944 (Circuit Court of Appeals, 6th Circuit), the court in denying enforcement orders under a situation similar to that of the instant case said:
>
> 'The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products. * * * It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view.'
>
> "We agree with the statement just quoted. Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge." (*Atkins,* R. 266).

Inasmuch as the decision in the *Atkins Case* can be rested upon the same ground as the decision in the *Federal Case* and the *Jones Case,* basis for certiorari does not exist under the first ground alleged in support of the Board's petition.

3. **The Decision in the *Atkins Case* Does Not "Overturn" the Board Policy which, for a Period of Nearly Three (3) Years Has Effected Stable Conditions in a Large and Difficult Area in Labor Relations.**

As has already been pointed out the facts in the one hundred thirty-five cases cited by the Board in its Petition for Certiorari (pp. 38-41) are facts in which the Employer conceded that the plant guards were "employees," but contended that it would not effectuate the policies of the Act to require the employer to bargain with them.

The decision in the *Atkins Case* is based upon facts and contentions which did not exist and were not made in the one hundred thirty-five decisions referred to.

4. **Demilitarization of the Plant Guards at the Atkins Plant Constitutes the Further Prosecution of the *Atkins Case* a Moot Case.**

It is pointed out in the Board's Petition for Certiorari that the guard forces at the two Atkins plants were demilitarized on January 6, 1944 and March 7, 1944. This demilitarization renders the *Atkins Case* moot.

Unlike the Unions in the *Federal Case* and the *Jones Case*, the plant guard unit in the *Atkins Case* comprised militarized plant guards stationed at the Curtiss-Wright Corporation, Merz Engineering Company, Marmon-Herrington Company, and International Machine and Tool Company. (*Atkins*, R. 111-12.) There is no evidence that the plant guards at these latter four plants have been demilitarized. The plant guard local cannot, therefore, properly be said to be the representative of the demilitarized guards at the Atkins Plant. A new certification of proper

representatives will therefore have to be made by the Board before the unit in which the plant guards at the Atkins Plant are to be included can be established.

Furthermore the decision in the *Atkins Case*, which is unique upon its facts—facts which are not to be confused with the facts in the one hundred thirty-five decisions cited by the Board—will in no wise determine further procedure in any of the 3,000 other plants, still maintaining militarized guards, to which the Board makes reference in its brief. From all that appears in such brief, the employers in such plants admit that the plant guards are their employees but take the position that it will not further the purposes of the Act to bargain with them.

5. The Petition for Certiorari should be Dismissed for Improper Joinder.

The three Petitions for Certiorari in Cases Nos. 1236, 1237 and 1238 are improperly joined for the following reasons:

(a) **There is no Similarity of Facts between the *Federal Case* and the *Jones Case* on the one Hand, and the *Atkins Case* on the Other Hand. The National Labor Relations Board is merely trying, by confusing the facts in the *Atkins Case* with those in the other two Cases, to have the *Atkins Case* Dragged into the Supreme Court along with the other two Cases.**

(b) **The Board did not even serve upon Counsel for Respondent copies of the Transcripts of Record in the *Federal Case* and the *Jones Case*. It was only after counsel pointed out to the Board the great number**

of record references contained in the Petition for Certiorari to the other two records that Temporary Loans of such Records were obtained from the Board.

(c) By the misjoinder, complained of, the Board seeks to have this Honorable Court consider, in the *Atkins Case,* evidence introduced in the other two cases, such as, for instance, certain Regulations promulgated by subordinates of the War Department (*Federal,* R. 75-96), which were not introduced in the *Atkins Case,* and vice versa. Each of the cases should be considered upon its own Facts.

6. **The Respondent Requests Leave to Reserve Certain Points Not Presented by the Petition for Certiorari, if the latter is granted.**

In the event the Petition for Writ of Certiorari is granted, the Respondent begs leave of this Honorable Court to argue the following points connected with the *Atkins Case:*

(a) **The Respondent's Petition for Leave to Adduce Additional Evidence. (Respondent's Pleadings, pp. 23-32.)**

(b) **The impropriety of taking Judicial Knowledge of the War Department Regulations, as taken by the Circuit Court of Appeals for the Seventh Circuit.** (*Atkins,* R. 253.)

(c) **The impropriety of the Board's finding that "contentions, advanced in other cases, such as the *Chrysler Case,* the *Phelps Dodge Case,* and the *Dravo Corporation Case,* that plant guards were**

supervisory employees and therefore not the subject matter of collective bargaining, had been made in the *Atkins Case*, and that consequently the decision in the *Atkins Case* should follow the decision in the other cases."

(d) The error of the Board in impressing its order with a scope not justified by the facts in contravention of the decision of this Honorable Court in *NLRB v. Express Publishing Company*, 213 U. S. 426, 433 (1941), and the decision of the Seventh Circuit Court of Appeals in *McQuay-Norris Manufacturing Co. v. NLRB*, 119 F. (2d) 1009 (1941).

7. **Conclusion.**

The decision of the Seventh Circuit on the question of employees' status does not on the facts conflict with the decisions of the Sixth Circuit; and the principal ground of decision of the Seventh Circuit coincides with those of the Sixth Circuit.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari in this case should be denied.

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